

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, :
:
Plaintiff, : ECF CASE
:
vs. : 12 Cr. 125 (JSR)
:
DOUG WHITMAN, :
:
Defendant. :
:
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**RESPONSE OF DEFENDANT DOUGLAS F. WHITMAN TO
THE GOVERNMENT'S MOTION TO INTRODUCE PROFFER STATEMENTS**

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The government has moved under *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004), to introduce at trial statements made by Mr. Whitman at proffer sessions on December 16 and 17, 2010, “should [Mr.] Whitman or [his] counsel make arguments to the contrary.” Gov. Mot. To Introduce Proffer Statements, Dkt. No. 63 (July 16, 2012). Under the governing law in this circuit,¹ Mr. Whitman does not dispute that, to the extent he presents evidence or arguments that are contrary to Mr. Whitman’s statements in those proffer sessions, the government may introduce those statements for purposes of rebuttal. However, Mr. Whitman reserves the right during trial to oppose admission of the proffer statements on the ground that the evidence and arguments he has presented are not in fact contrary to those statements, or on any other applicable ground.

In particular, Mr. Whitman has not “opened the door” to the use of his proffer by refusing to accept a plea and maintaining his innocence. The proffer contained no admission whatsoever by Mr. Whitman that he was guilty of a crime, nor did it contain evidence independently sufficient to support that conclusion. The defense therefore will object to any use of the proffer by the prosecution unless and until the defense contradicts a fact admitted by Mr. Whitman in that proffer session. We anticipate that no such thing will occur at trial: Mr. Whitman told the truth at his proffer, and the truth here is that he is not guilty of the crimes with which he has been charged.

¹ The defense contends that *United States v. Velez* was wrongly decided and is contrary to Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410, and violates Mr. Whitman’s Sixth Amendment right to present a defense and to have the effective assistance of counsel. See *United States v. Duffy*, 133 F. Supp. 2d 213 (E.D.N.Y. 2001), *declined to follow by Velez*, 354 F.3d at 195. Mr. Whitman hereby preserves that argument for any eventual appellate review.

Dated: July 23, 2012

Respectfully submitted,

/s/ David L. Anderson

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2012, I caused a true and correct copy of the Response of Defendant Douglas F. Whitman's to the Government's Motion to Introduce Proffer Statements to be served via ECF filing notification on the following counsel of record:

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Dated: July 23, 2012

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